Pengarah Tanah dan Galian Negeri Johor v YKK (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(NCVC)(A)-441–11 OF 2017
HAMID SULTAN, ZALEHA YUSOF AND YAACOB MD SAM JJCA
26 FEBRUARY 2019

Land Law — Lease — Renewal of lease — Option to renew for new term — Refusal to extend by state authority — Whether option to renew clause originated from contractual bargain — Whether respondent secured contractual lease subjected to private law simpliciter — Whether respondent could seek specific performance against government — National Land Code s 76 — Government Proceedings Act 1956 s 29

The appellant/defendant appealed against the decision of the learned judicial commissioner who had decided in favour of the respondent/plaintiff who was a lease holder of a property under the National Land Code ('the NLC'). The respondent had obtained a statutory lease of land for 60 years, pursuant to s 76 of the NLC with an option to renew for 30 years. The respondent had taken the position that the option to renew clause could be enforced against the state authority ('the SA') on pure contractual principle when there was a refusal to extend. For this purpose, the respondent had filed an originating summons seeking for, inter alia, specific performance of cl 7 of the Special Conditions to the lease dated 31 July 1960 ('the lease') in respect of the land described as HSD 4981, Lot TLO 6893, Bandar Johor Bahru, Johor Bahru, Johor DT ('the land'). The appellant took the position that the general contract principles did not apply and the learned judicial commissioner's approach of deciding the case based on contractual principle and invoking the doctrine of legitimate expectation which doctrine was generally applicable to public law remedies only, was not only misconceived but clearly wrong. In addition, learned federal counsel said that the learned judicial commissioner misconstrued cases related to contractual as well as judicial review principle and in consequence the integrity of the decision making process had been compromised. The appellant had also taken procedural objection to the respondent's originating summons.

Held, allowing the appeal with costs:

(1) Clause 7 of the Special Conditions to the lease originated from a provision under a statute. Clause 7 did not originate from a contractual bargain in the usual context of the contract law which related to private law remedy. The lease the respondent had secured was a statutory lease and not a contractual lease subject to private law simpliciter. The appellant was exercising his public duty as the power to renew the lease

was a power of the SA to alienate lands as provided for under the NLC. In consequence, the respondent mode of approaching the court and seeking for private law remedy was not sustainable in law and ought to have been dismissed by the learned trial judge at limine (see paras 13–14). A

(2) The respondent seeking specific performance against government and/or governmental bodies may not be sustainable pursuant to s 29 of the Government Proceedings Act 1956 (see para 14). B

[Bahasa Malaysia summary

Perayu/defendan merayu terhadap keputusan pesuruhjaya kehakiman yang bijaksana yang telah memutuskan memihak kepada responden/plaintif yang merupakan pemegang pajakan bagi satu hartanah di bawah Kanun Tanah Negara ('KTN'). Responden telah memperoleh pajakan tanah berkanun selama 60 tahun, menurut s 76 KTN dengan pilihan untuk memperbaharui selama 30 tahun. Responden telah mengambil kedudukan bahawa klausa pilihan untuk memperbaharui boleh dikuatkuasakan terhadap pihak berkuasa negeri ('SA') pada prinsip kontraktual yang jelas apabila terdapat penolakan untuk pelanjutan. Untuk tujuan ini, responden telah memfailkan saman pemula yang memohon, antara lain, pelaksanaan spesifik klausa 7 Syarat Khas kepada pajakan bertarikh 31 Julai 1960 ('pajakan') berkenaan dengan tanah yang digambarkan sebagai HSD 4981, Lot TLO 6893, Bandar Johor Bahru, Johor Bahru, Johor DT ('tanah'). Perayu mengambil kedudukan bahawa prinsip-prinsip kontrak am tidak terpakai dan pendekatan pesuruhjaya kehakiman yang bijaksana untuk memutuskan kes itu berdasarkan prinsip kontrak dan mengambil doktrin jangkaan sah yang secara amnya terpakai untuk remedi undang-undang awam bukan sahaja, adalah bukan sahaja salah difahami tetapi jelas salah. Di samping itu, peguam persekutuan yang bijaksana mengatakan bahawa pesuruhjaya kehakiman yang bijaksana menyalahtafsirkan kes yang berkaitan dengan kontrak dan prinsip semakan kehakiman dan akibatnya integriti proses membuat keputusan telah dikompromikan. Perayu juga telah mengambil bantahan prosedur terhadap saman pemula responden. C D E F G

Diputuskan, membenarkan rayuan dengan kos:

(1) Klausa 7 Syarat Khas pajakan tersebut berasal daripada peruntukan di bawah suatu undang-undang. Klausa 7 tidak berasal daripada tawaran kontrak dalam konteks biasa undang-undang kontrak yang berkaitan dengan remedi undang-undang persendirian. Pajakan yang diterima oleh responden adalah pajakan berkanun dan bukan pajakan kontrak tertakluk kepada undang-undang persendirian *simpliciter*. Perayu menjalankan tugas awam kerana kuasa untuk memperbaharui pajakan adalah kuasa SA untuk memberi milik tanah sebagaimana diperuntukkan di bawah NLC. Akibatnya, cara responden mendekati mahkamah dan memohon remedi undang-undang persendirian adalah H I

tidak boleh dikekalkan dalam undang-undang dan sepatutnya telah ditolak oleh hakim bicara yang bijaksana secara limine (lihat perenggan 13–14).

(2) Responden yang memohon pelaksanaan spesifik terhadap kerajaan dan/atau badan-badan kerajaan tidak mungkin dapat dikekalkan selaras dengan s 29 Akta Prosiding Kerajaan 1956 (lihat perenggan 14).]

Notes

For cases on renewal of lease, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4030–4033.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd [2015] 2 MLJ 509; [2015] 1 CLJ 357, CA (refd)

O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, HL (refd)

Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors [2014] 3 MLJ 661, CA (refd)

Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd [2009] 5 MLJ 607; [2009] 6 CLJ 751, CA (refd)

Legislation referred to

Arbitration Act 2005 s 5
Government Proceedings Act 1956 s 29, 29(1)
National Land Code ss 5, 42, 42(1), 76, 418

Appeal from: Originating Summons No JA-24NCVC-549–08 of 2016 (High Court, Johor Bahru)

Abdul Malik bin Ayob (State Legal Advisor, Johor Legal Advisor's Office) for the appellant.

S Ravindran (Sreenevasan Young) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/defendant appeals against the decision of the learned judicial commissioner who had decided in favour of the respondent/plaintiff who was a lease holder of a property under the National Land Code ('the NLC').

PRELIMINARIES

[2] The respondent had obtained a statutory lease of land for 60 years, pursuant to s 76 of the NLC with an option to renew for 30 years. The respondent has taken the position that the option to renew clause can be enforced against the state authority on pure contractual principle when there was a refusal to extend. For this purpose, the respondent had filed an originating summons seeking the following prayers, namely:

1. Specific performance of Clause 7 of the Special Conditions to the Lease dated 31.7.1960 ('Lease') in respect of the land described as HSD 4981, Lot TLO 6893, Bandar Johor Bahru, Johor Bahru, Johor DT ('Land');

2. Consequent upon Prayer 1, that the Defendant do, within 14 days of this Order:

(a) issue Borang 12A pursuant to section 197 of the National Land Code 1965, Borang Jadual 1 pursuant to the Johor Land Rules and all the other relevant and necessary forms and/or documents to the Plaintiff; and

(b) inform the Plaintiff of the sums payable as the appropriate premium based upon the undeveloped value of the Land and rent at the current rates

to enable the Plaintiff to surrender the Lease and obtain in exchange therefore a new Lease for a term of 30 years from the date of the Plaintiff's exercise of the option pursuant to Clause 7 of the Special Conditions to the Lease.

3. As an alternative to Prayer 1, a declaration that:

(a) the Defendant's decision to freeze the Plaintiff's right to exercise Clause 7 of the Special Conditions to the Lease dated 31.7.1960 ('Lease') in respect of the land described as HSD 4981, Lot TLO 6893, Bandar Johor Bahru, Johor Bahru, Johor DT ('Land') is:

(i) illegal and ultra vires the powers of the Defendant and/or the provisions of the National Land Code 1965 and a breach of the Plaintiff's rights under the Lease and/or the Federal Constitution; and/or

(ii) a breach of the Special Conditions to the Lease; and/or

(b) the Plaintiff is entitled to exercise its rights pursuant to Clause 7 of the Special Conditions to the Lease.

3. General damages;

4. Aggravated or exemplary damages;

5. Interest at the rate of 5% per annum on the damages awarded pursuant to Prayer 3 from the date of this Order until full realisation;

6. Costs;

7. Such further or other relief deemed fit, just, appropriate and/or necessary by this Honourable Court.

[3] In essence, the appellant takes the position that the general contract principles do not apply and the learned judicial commissioner's approach of deciding the case based on contractual principle and invoking the doctrine of legitimate expectation which doctrine is generally applicable to public law remedies only, is not only misconceived but clearly wrong. In addition, learned federal counsel says that the learned judicial commissioner misconstrued cases related to contractual as well as judicial review principle and in consequence the integrity of the decision making process has been compromised.

[4] The appellant had taken procedural objection to the respondent's originating summons and it is captured in the judgment as follows:

> [22] The learned federal counsel also raises two procedural objections in her written submission. These were on the contention that the plaintiff had failed to appeal to the court under s 418 of the NLC and the plaintiff ought to have filed a judicial review if indeed the plaintiff was aggrieved by the defendant's decision.

[5] The learned federal counsel summarised the argument as follows:

> Conclusion
>
> 78. The appellant's case can be summarised and concluded as follows:
>
> (i) renewal of a lease is part of the power of alienation of land of the state authority under the National Land Code;
>
> (ii) an express condition on the land binds the proprietor but is not a contract between the proprietor and the state authority;
>
> (iii) an express condition on a land does not give rise to legitimate expectation;
>
> (iv) the correct mode of challenging the state authority's decision is by way of judicial review; and
>
> (v) specific performance cannot be ordered against the government.

[6] The amended memorandum of appeal, inter alia, reads as follows:

> 1. Yang Arif Pesuruhjaya Kehakiman terkhilaf dari segi undang-undang dan fakta kerana membenarkan permohonan Plaintif tanpa mengambil kira bahawa perintah pelaksanaan spesifik tidak boleh diberikan terhadap kerajaan di bawah Akta Relif Specifik 1951.
>
> 2. Yang Arif Pesuruhjaya Kehakiman terkhilaf dari segi undang-undang dan fakta kerana gagal mengambil kira bahawa kuasa untuk meluluskan suatu sambung pajak atau membekukan sambung pajak adalah di bawah bidang kuasa multak Pihak Berkuasa Negeri (PBN) dan Klausa 7 dalam Syarat Khas tanah tersebut adlah menidakkan kuasa mutlak tersebut.
>
> 3. Yang Arif Pesuruhjaya Kehakiman terkhilaf dari segi undang-undang dan fakta apabila memutuskan terdapat kontrak antara Plaintif dan Defendan gagal mempertimbangkan bahawa tiada kontrak wujud di antara Plaintif

dan Defendan selagi pajakan tersebut belum disambung, Plaintif didaftarkan di atas pajakan yang disambung tersebut dan Plaintif menurut syarat-syarat lain sebelum pajakan tersebut disambung semula.

4. Yang Arif Pesuruhjaya Kehakiman terkhilaf dari segi undang-undang dan fakta apabila gagal membuat pertimbangan bahawa kausa tindakan Plaintif adalah terhadap keputusan PBN membekukan permohonan melanjutkan pajakan dan mod tindakan terhadap keputusan PBN adalah melalui Semakan Kehakiman dan bukannya melalui Saman Pemula.

5. Yang Arif Pesuruhjaya Kehakiman jelas terkhilaf dari segi undang-undang dan fakta bahawa Mahkamah tidak mempunyai bidangkuasa untuk menghalang atau mencampuri keputusan PBN yang melibatkan dasar dan polisi kerajaan yang mana Mahkamah hanya terikat dengan kewajipan campurtangan apabila mendapati tindakan eksekutif tidak konsisten dengan Perlembagaan atau terdapat elemen-elemen berniat jahat dan penyalahgunaan kuasa. Namun begitu Plaintif tidak menolak atau menyangkal bahawa terdapat elemen berniat jahat dan penyalahgunaan kuasa dalam keputusan PBN tersebut.

6. Yang Arif Pesuruhjaya Kehakiman terkhilaf apabila beliau gagal mempertimbangkan fakta bahawa Plaintif tidak mempunyai harapan sah terhadap pengoperasian kilang di kawasan perindustrian Larkin sehingga tahun 2050, kerana permohonan lanjutan pajakan telah pun dibekukan melalui keputusan MMK dan melalui seksyen 76 KTN, hanya PBN sahaja yang mempunyai kuasa untuk memberimilik atau secara tersiratnya meluluskan/membekukan permohonan lanjutan pajakan.

BRIEF FACTS AND GROUNDS OF DECISION

[7] To appreciate the grounds of our decision, it must be read together with the judgment of the High Court. To save judicial time, the brief facts and grounds of decision as summarised before us in a rudimentary manner is set out and read as follows:

BRIEF FACTS OF THE CASE

1. On 31 July 1960, the state authority ('SA') alienated the land which is located in the Larkin Industrial Area for a term of 60 years.

2. The lease expires on 30 July 2020.

3. The land was to be used solely for the erection of factory building.

4. The plaintiff acquired and registered the lease on 9 March 1980 thereby acquiring more than 40 years of the unexpired portion of the lease.

5. Clause 7 of the special conditions of the lease provides the plaintiff with an option to renew.

6. On 13 March 2014, in a meeting between the defendant and the plaintiff's representatives, the defendant informed that they would be issuing a notice to all the factory owners that the defendant would not be

renewing the leases in the Larkin area to give effect to the state government's future development plans for the area and that it had taken steps to freeze all lease renewal applications.

7. The defendant by a letter dated 18 August 2015 informed the plaintiff that the SA has decided to convert Larkin area into a housing area and had frozen all lease renewal applications.

8. On 24 August 2015, the plaintiff gave notice to the defendant of its liberty to exercise the option to renew ('renewal notice') and asked the defendant to inform the plaintiff of the appropriate premium based on the undeveloped value of the land and the current rental rate that is payable.

9. The defendant has not responded to the renewal notice.

10. The plaintiff argued that it has made its investment and acquired the lease in reliance on the option to renew as the plaintiff would be guaranteed to use the factory and its operation in the Larkin area until at least 2050.

11. The plaintiff argued that the defendant's decision will cause irreparable loss and damage to the plaintiff which cannot be adequately compensated.

12. The defendant argued that they have absolute power to approve the grant of lease and/or extension thereof and the plaintiff does not have an automatic right to a renewal of the lease.

13. The defendant raised two preliminary objections; the plaintiff had failed to appeal to the court under s 418 of the NLC and the plaintiff ought to have filed a judicial review if indeed the plaintiff was aggrieved by the defendant's decision.

FINDING(S) OF THE LEARNED JUDICIAL COMMISSIONER

Whether the defendant's refusal to renew the plaintiff's lease constitutes a breach of the option to renew in cl 7 of the special conditions of the lease

1. The learned JC found that cl 7 creates a binding obligation on the defendant to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate amount of premium and surrendering the current lease.

2. The defendant vide its letter dated 18 August 2015 and its refusal to provide the renewal forms had made it clear that it will not honour its obligation to renew the lease and therefore, in breach of cl 7.

3. The learned JC premised his interpretation on a plain and literal reading of cl 7 which stated clearly that it was the clear intention of the SA to grant a new lease for a term of 30 years upon the plaintiff giving notice, paying the appropriate premium and surrendering the current lease. Clause 7 grants the plaintiff an automatic renewal.

4. Clause 7 creates a contractual right in favour of the plaintiff which is binding upon the defendant.

5. The plaintiff has a legitimate expectation that upon serving the renewal notice to the defendant, paid the appropriate premium and surrendered the current lease, the defendant is obliged to grant a new lease of 30 years to the plaintiff.

6. The defendant had exceeded its power by refusing to renew the lease and the decision was therefore unlawful, illegal and ultra vires.

Procedural objections

1. The objections were disregarded as it was never raised in the affidavits of the defendant.

2. In the alternative, the learned JC stated that it was not mandatory for the plaintiff to appeal under s 418 to challenge the decision of the land administrator.

3. The learned JC stated that the plaintiff's complaint was about the breach of its right under cl 7 which is a private right and therefore, there is no public law element involved in the facts of the present case.

4. The plaintiff is entitled to initiate a proceeding by way of an originating summons.

CONCLUSION

Order in terms in prayers (1), (2)(a) and (b) of encl 1 with costs of RM3,000 subject to the payment of allocator fee.

JURISPRUDENCE RELATED TO STATUTORY LEASE AND CONTRACTUAL LEASE AND ORDER OF SPECIFIC PERFORMANCE AGAINST THE GOVERNMENT

[8] It is well established that a leasehold title is evidence of alienation of land as per the NLC. Section 5, inter alia, defines this as follows:

> 'alienate' means to dispose of State land in perpetuity or for a term of years, in consideration of the payment of rent, and otherwise in accordance with the provisions of section 76 or, when used in relation to the period before the commencement of this Act, to dispose of State land in perpetuity or for a term of years under a previous land law (not being a law relating to mining);
>
> 'alienated land' means any land (including any parcel of a sub-divided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years, and whether granted by the State Authority under this Act or in the exercise of powers conferred by any previous land law, but does not include mining land;
>
> 'disposal' means any disposal of land made by the State Authority in the exercise of any of the powers conferred by section 42 or of any of the corresponding powers conferred by any previous land law.

[9] A lease granted under s 76 of the NLC, upon alienation of land under

s 42 is often referred to as statutory lease. A leasehold is a form of alienation as per the NLC. The powers of disposal of the state is spelled out in s 42(1) of the NLC while alienation is provided by s 76 of the NLC. The said s 42 reads as follows:

> 42 Powers of disposal
>
> (1) Subject to sub-section (2), the State Authority shall have power under this Act —
>
> (a) to alienate State land in accordance with the provisions of section 76;
>
> (b) to reserve State land, and grant leases of reserved land, in accordance with the provisions of Chapter 1 of Part Four;
>
> (c) to permit the occupation of State land, reserved land and mining land under temporary occupation licences issued in accordance with the provisions of Chapter 2 of Part Four;
>
> (d) to permit the extraction and removal of rock material from any land, other than reserved forest, in accordance with the provisions of Chapter 3 of Part Four;
>
> (e) to permit the use of air space on or above State land or reserved land in accordance with the provisions of Chapter 4 of Part Four provided that such air space shall be within the confines of a structure of any description erected thereon.
>
> (2) Nothing in this Act shall enable the State Authority —
>
> (a) to dispose of any land for the purposes of mining (within the meaning of the Mining Enactment);
>
> (b) to permit the extraction or removal of rock material from any land for the purpose of obtaining metal or mineral therefrom;
>
> (c) to dispose of any land for the purpose of the removal of forest produce therefrom; or
>
> (d) to alienate any land so as to have the effect of less than two-fifths of a hectare of land subject to the category 'agriculture' or to any condition requiring its use for any agricultural purpose being held by more than one person or body, provided that the State Authority may, under exceptional circumstances, alienate such land to more than one person or body notwithstanding that it is less than two-fifths of a hectare.

Section 76 reads as follows:

> 76 Meaning of alienation
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> The alienation of State land under this Act shall consist of its disposal by the State Authority —
>
> (a) for a term not exceeding ninety-nine years;

(aa) in perpetuity —

(i) where the Federal Government requires the State Authority to cause a grant in perpetuity to be made to the Federal Government or to a public authority or where the Federal Government and the Government of the state agree to make a grant in perpetuity to the Federal Government;

(ii) where the State Authority is satisfied that the land is to be used for a public purpose; or

(iii) where the State Authority is satisfied that there are special circumstances which render it appropriate to do so.

(b) in consideration of the payment of an annual rent;

(c) in consideration, unless the State Authority thinks fit to exempt therefrom in any particular case, of the payment of a premium;

(d) subject, unless the State Authority otherwise directs pursuant to sub-section (5) of section 52, to a category of land use determined in accordance with sub-sections (2) and (3) of that section; and

(e) subject to such conditions and restrictions in interest as may be imposed by the State Authority under, or are applicable thereto by virtue of, any provision of this Act:

Provided that nothing in paragraph (aa) shall enable the State Authority to dispose of any part of the foreshore or sea-bed for a period exceeding ninety-nine years; and paragraph (d) shall not apply to the alienation of land under this Act in pursuance of an approval given by the State Authority before the commencement thereof.

[10] In relation to statutes like NLC, etc any final decision of authorities exercised in consequence of a statute will fall in the realm of public law jurisprudence and relief will be judicial review if the person affected by the decision is notified and/or had nexus to the decision making process. The court process is subject to any other appeal mechanism within the provisions of NLC (see s 418 of the NLC). Where the person affected had no nexus to the decision making process itself and could not have appealed to the higher authorities within the scheme of the Act and only comes to know of the decision outside the time, a writ or origination summons procedure is available. This was explained in *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124 and adopted by the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145; *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661.

[11] The government or government authorities may have powers to rent or lease government assets on pure contractual terms. For example, a government building can be rented out to a private person. Such contracts are private in nature and general law of contract will apply subject to any restriction in relief. This distinction was clearly set out in the case of *Majlis Perbandaran Subang*

Jaya v Laguna De Bay Sdn Bhd [2015] 2 MLJ 509; [2015] 1 CLJ 357. The Court of Appeal, inter alia, held:

> (1) The Local Government Act 1976 ('the Act') gives the local authority at least two types of powers: (i) to function within the provision of the Act in matters relating to the local authority and the public. When exercising this power, it is trite that it can only act according to the laws that govern it and the decision will be subject to judicial review; and (ii) the power of a body corporate and that will be the powers vested in any corporation and has nothing to do with public rights or obligations or interest.

[12] Learned counsel for the respondent took the view that s 76 read with cl 7 makes it a contractual lease and not a statutory lease and in consequence private law remedy is available to renew the lease for the unexpired period. Clause 7 of the lease reads as follows:

> At any time not less than six months before the date of expiration of this lease the lessee may, at his option exercised in writing and upon payment of an appropriate premium based upon the undeveloped value of the land and rent at then current rates, surrender this lease and obtain in exchange therefore a new lease for the term of 30 years from the date of his exercise of the said option. Such new lease shall be subject to all the terms and conditions of this lease except the option by this condition conferred.

[13] We find the above argument as misconceived as cl 7 itself originates from a provision under a statute. Clause 7 does not originate from a contractual bargain in the usual context of the contract law which relates to private law remedy. The distinction in jurisprudence is not just related to an orange and an apple, but indeed, it is related to a marble and a pumpkin.

[14] We have read the able appeal records and able submissions of the parties. After giving much consideration to the submission of the appellant, we take the view that the appeal must be allowed. Our reasons, inter alia, are as follows:

(a) the lease the respondent has secured is a statutory lease and not a contractual lease subject to private law simpliciter. The appellant was exercising his public duty as the power to renew the lease is a power of the SA to alienate lands as provided for under the NLC. In consequence, the respondent mode of approaching the court and seeking for private law remedy is not sustainable in law and ought to have been dismissed by the learned trial judge at limine (see *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 and *Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd* [2015] 2 MLJ 509; [2015] 1 CLJ 357);

(b) the respondent seeking specific performance against government and/or

governmental bodies may not be sustainable pursuant to s 29 of the Government Proceedings Act 1956. (For exception, see s 5 of the Malaysia Arbitration Act 2005). Section 29(1) reads as follows:

> 29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (c) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (d) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

(a) in dealing with s 29 related to injunction against government, the Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751, held:

> (4) Notwithstanding the High Court's discretion to grant an injunction, s 29 of the GPA does not permit the granting of any injunction against the government. Likewise, s 54 of the SRA prohibits the grant of an injunction against any Malaysian government department. The words of s 29(1)(a) of the GPA are quite clear and there is no reason to depart from it.

[15] Taking a holistic approach on the law and facts, we take the view that the appeal has merits. The respondent's claim on private law remedy ought to fail and that does not mean that the respondent cannot proceed again on its rights, based on public law relief provided there is no legal or statutory impediment to do so.

[16] For reasons stated above, we will allow the appeal with costs. We hereby order so.

Appeal allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh